STATE OF MICHIGAN
IN THE SUPREME COURT

ANGLERS OF THE AUSABLE, INC., a Michigan nonprofit corporation; MAYER FAMILY INVESTMENTS, LLC, a Michigan limited liability company; and NANCY A. FORCIER TRUST,

Plaintiffs-Appellants,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, a department of the Michigan Executive Branch; STEVEN E. CHESTER, Director of the Michigan Department of Environmental Quality; and MERIT ENERGY CORPORATION, a Delaware corporation,

Defendants-Appellees.

Supreme Court Docket No.: 138863, 138864, 138865, 138866

Court of Appeals Docket No.: 279301, 2793066, 2802656, 280266 (Consolidated)

Otsego County Circuit Court Case No. 06-11697-CE (M)

AMICUS CURIAE BRIEF OF THE MICHIGAN MANUFACTURERS ASSOCIATION

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Michigan Manufacturers Association ("MMA") is an association of private Michigan businesses, organized and existing to study matters of general interest to its members, to promote the interests of Michigan businesses and of the public in the proper administration of laws relating to its members, and otherwise to promote the general business and economic climate of the State of Michigan. A significant aspect of MMA's activities involves representing the interests of its members before the courts, United States and Michigan legislature and state administrative agencies. MMA appears before this Court as a representative of approximately three thousand private business concerns, all of which are potentially affected by the issues currently before this Court in this case.

In its January 29, 2010 order granting leave to appeal, this Court directed the parties to brief the issues of whether the right to discharge water on land owned by the state could be conveyed or granted to Defendant-Appellant Merit Energy Corporation ("Merit Energy"), and what test should be applied to determine whether and the extent to which Merit Energy may discharge water. The importance of natural resources, including watercourses, for both recreational and commercial uses in Michigan, makes these issues highly significant to Michigan jurisprudence. Moreover, these issues are of particular importance to MMA and its members because water is used extensively throughout Michigan by MMA's members and other Michigan industries and, further, because MMA's members invest substantial capital and expend significant resources on a daily basis in reliance existing law surrounding water and other natural resource use.

The Court also directed the parties to brief the issues of whether *Preserve the Dunes v DEQ*, 471 Mich 511; 684 NW2d 847 (2004) and *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc,* 479 Mich 280; 737 NW2d 447 (2007) were correctly decided.

Preserve the Dunes properly interpreted Michigan's Environmental Protection Act, MCL § 324.1701, *et seq.* ("MEPA"). *Preserve the Dunes* held that § 1701 of MEPA does not permit a separate avenue (other than those that exist under separate statutes) for plaintiffs to challenge purely administrative actions of state agencies. With respect to the Court's direction to brief whether the plaintiffs have a cause of action under MEPA against Defendant Appellee Michigan Department of Environmental Quality ("MDEQ"),[1] *Preserve the Dunes* has already properly answered this question, and this answer has become one of the cornerstones of stable jurisprudence in Michigan. Manufacturers and their suppliers frequently conduct activities authorized by environmental permits. Their ability to rely on the finality of environmental permits is of utmost importance because capital investments and strategic planning require stability and predictability. Overturning *Preserve the Dunes* will provide a vehicle for private citizens to challenge environmental permits collaterally - long after they had otherwise become final - based on *de minimis* flaws in the permit process or merely citizen discontent with the outcome of administrative proceedings. This expansive view of MEPA cannot be not supported by the statutory language. MEPA does not provide an avenue for citizens to invalidate issued permits based on speculation alone that the permitted conduct will impair natural resources.

[1] Pursuant to Executive Order 2009-45, Governor Jennifer M. Granholm created the Michigan Department of Natural Resources and Environment ("MDNRE") as a principal department of state government, transferred by a Type II transfer all of the authority, powers, duties, functions, responsibilities, personnel, equipment, and budgetary resources of the MDEQ to the MDNRE, and abolished the MDEQ. To avoid confusion, *amicus* will refer to Defendant-Appellee MDEQ and the MDNRE as "MDEQ" throughout this brief.

With respect to whether *Nestlé* was decided correctly, *amicus* notes that this case was recently overturned by this Court in *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, _ Mich _; _ NW2d _; 2010 Mich LEXIS 1657 *34, fn. 18 (2010). However, *amicus* believes the Court should revisit *Nestlé*, given the impracticability of the new "standing" standard announced in *Lansing Schools* as applied to MEPA claims. In extending the holding of *Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004) adopting a constitutional standing test, *Nestlé* clarified that the Legislature may not expand the judicial power through a statutory grant of standing where no constitutional standing exists. Although the primary holding in *Nestlé* with regard to standing to bring a claim under MEPA may now be defunct, significant questions surrounding the judicial authority to hear "disputes" that are only appropriately resolved through the legislative or executive branches remain, and are of interest to the manufacturing sector.

The interests of manufacturers are coextensive with the interests of the citizens of Michigan, insofar as manufacturing is the backbone of Michigan's economy. As of August 2010, Michigan manufacturers support approximately a half of a million Michigan jobs.[2] Moreover, according to the most recent information from the U.S. Bureau of Economic Analysis, the manufacturing sector contributed nearly $62 million of Michigan's $382 million gross domestic product in 2008.[3] Manufacturing contributes substantially to Michigan job growth and economic output, and the promotion of a thriving manufacturing sector in Michigan is of the utmost importance to the future economic survival of this state. Restrictions on manufacturers'

[2] Michigan Department of Energy, Labor and Economic Growth's Labor Market Information Data available online athttp://www.milmi.org/admin/uploadedPublications/940_micaetmm.htm (accessed September 27, 2010).
[3] See Bureau of Economic Analysis Regional Gross Domestic Product Data. Available online at http://www.bea.gov/newsreleases/regional/gdp_state/gsp_newsrelease.htm (accessed September 27, 2010).

property rights, limiting manufacturers' rights to use water, and permitting collateral attacks on environmental permits and the promulgation of administrative rules will lead to increased litigation and create a substantial risk to the future of a successful manufacturing sector in Michigan. Therefore, the issues in this case substantially affect not only the manufacturing sector, but the economy of the State of Michigan as a whole, including employment levels, economic growth, tax revenue, and the ability of Michigan industries to compete in the regional, national, and global marketplaces.

STATEMENT OF JURISDICTION

Amicus adopts by reference the jurisdictional statement of Defendant-Appellee Merit Energy.

STATEMENT OF QUESTIONS INVOLVED

I. Whether Merit Energy could be conveyed or granted the right to discharge water on land owned by the state, where riparian rights can be expressly granted by easement?

Court of Appeals' answer: Yes
Plaintiffs-Appellants' answer: No
Defendants-Appellees' answer: Yes
Amicus Curiae answer: Yes

II. Whether the reasonable use balancing test should be applied to determine whether and the extent to which Merit Energy should discharge water?

Court of Appeals' answer: Yes
Plaintiffs-Appellants' answer: No
Defendants-Appellees' answer: Yes
Amicus Curiae answer: Yes

III. Whether a permitting decision is "conduct" subject to Michigan's Environmental Protection Act, MCL § 324.1701, *et seq*.

Court of Appeals' answer: No
Plaintiffs-Appellants' answer: Yes
Defendants-Appellees' answer: No
Amicus Curiae answer: No

IV. Whether *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc,* 479 Mich 280; 737 NW2d 447 (2007) was correctly decided.

Court of Appeals' answer: The Court of Appeals did not decide this issue.
Plaintiffs-Appellants' answer: No
Defendants-Appellees' answer: Yes
Amicus Curiae answer: Yes

STATEMENT OF FACTS

Amicus adopts by reference the statement of facts of Defendant-Appellee Merit Energy.

STANDARD OF REVIEW

This Court reviews the scope and application of common-law claims, such as the application of riparian law, *de novo*, but reviews a trial court's factual findings in a bench trial for clear error. *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25, 53; 709 NW2d 174 (2005), *aff'd in part, rev'd in part, and remanded on other grounds* 479 Mich 280; 737 NW2d 447 (2007); *Walters v Snyder,* 239 Mich App 453, 456; 608 NW2d 97 (2000). A trial court's interpretation of an easement is a question of law that is reviewed *de novo*. *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997)

The interpretation of the Michigan Environmental Protection Act, MCL § 324.1701, *et seq.* is a question of statutory interpretation that is reviewed *de novo*. *Preserve the Dunes Inc v Dep't of Envt'l Quality*, 471 Mich 508, 513; 684 NW2d 847 (2004). However, courts will not overturn a trial court's findings of fact unless they are clearly erroneous. *Trout Unlimited, Muskegon-White River Chapter v White Cloud (After remand)*, 209 Mich App 452, 456; 532 NW2d 192 (1995).

LAW AND ARGUMENT

I. RIPARIAN RIGHTS, INCLUDING THE RIGHT TO DISCHARGE WATER, CAN BE CONVEYED BY EASEMENT, REGARDLESS OF THE SOURCE OF THE WATER TO BE DISCHARGED

The Court of Appeals properly ruled that the easement granted by the Michigan Department of Natural Resources ("DNR") provided Merit Energy the "right to place, construct, operate, repair, and maintain" the pipeline over the DNR's property. *Anglers of the AuSable, Inc v Department of Envt'l Quality*, 283 Mich App 115; 770 NW2d 359 (2009). The Court of Appeals also correctly held that a riparian owner has the right to grant its riparian rights, including the right to discharge water, by easement. These rulings are directly in line with long-settled and sensible precedent and should be affirmed.

Just as with any interest in property, a riparian property owner may freely convey the riparian rights that attach to his property by easement. *Burt v Munger*, 314 Mich 659; 23 NW2d 117 (1946). *Little v Kin*, 249 Mich App 502, 644 NW2d 375 (2002), *aff'd, remanded*, 468 Mich 699; 664 NW2d 749 (2003). Further, riparian owners are permitted to drain their land into an adjoining watercourse. *Saginaw Co v McKillop*, 203 Mich 46, 52; 168 NW 922 (1918).[4] Because this is settled law, the Court of Appeals in this case properly held that the DNR, as a riparian owner, could grant an easement to a nonriparian owner for the construction of a pipeline to discharge treated water into an adjoining wetlands area that flowed into a watercourse. *Anglers of the AuSable, supra.*

The holding of the Court of Appeals (and the precedent upon which the Court of Appeals relied) respects the important public policy objectives of the freedom to contract. Because

[4] Appellants claim that *McKillop* stands for the proposition that riparians may not drain non-riparian surface water into a river. *McKillop* contains no such holding. *McKillop* merely ruled that the riparian owners have the right to drain their land. The question of whether non-riparian surface water can be drained, under the facts presented in *McKillop,* depended on many factors and "such a situation can[not] be disposed of as a matter of law." *McKillop*, 203 Mich at 53. The holding on which Appellants rely was never actually reached.

easements (in many cases) are granted by contract, deed or other agreement, courts are loathe to interfere with the agreement between the easement grantor and grantee to avoid impinging upon the freedom of contract. The "general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 356; 51 S Ct 476; 75 L Ed 1112 (1931). Citizens must be able to rely upon their private agreements in managing their affairs and exercising their rights to transfer and receive interests in property. As such, the holding of the Court of Appeals also respects individual property rights. An easement is a property right in real estate. *Ladd v Teichman*, 359 Mich 587, 597; 103 NW2d 338 (1960). Riparian rights are also property rights, which are protected by both the federal and state constitutions, prohibiting governmental taking of private property without just compensation. *Peterman v DNR*, 446 Mich 177, 195; 521 NW2d 499 (1994); *Mumaugh v McCarley*, 219 Mich App 641; 558 NW2d 433 (1996). Inhibition of or interference with property rights, including the ability to freely transfer property rights, as suggested by Anglers of the AuSable, Inc. and others ("Appellants"), raises grave concerns.

Appellants primarily argue to this Court that a riparian owner should not be permitted to grant riparian rights by easement for the discharge of water that "originated on land other than the riparian land in question." (Appellants' Br., p. 29-30). As discussed in Sections II.C and II.E, *infra*, Appellants' focus on on-tract versus off-tract water use derives from a misguided interpretation of the reasonable use doctrine that was never the law in Michigan. The resolution of this issue must, however, respect the contract and property rights guaranteed by the Michigan Constitution and our common law. Accordingly, this Court should affirm the Court of Appeals'

holding that the DNR properly granted Merit Energy riparian rights to discharge water by easement.

II. IN APPLYING THE REASONABLE-USE BALANCING TEST TO THIS DISPUTE BETWEEN RIPARIANS, THE COURT OF APPEALS ADHERED TO LONG-STANDING MICHIGAN PRECEDENT.

In *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25; 709 NW2d 174 (2005), *aff'd in part & rev'd in part on other grounds*, 479 Mich 280; 737 NW2d 447 (2007) ("*Nestlé*") the Court of Appeals panel comprised of Judges Smolenski, Murphy, and White issued a lengthy, comprehensive, and exhaustive opinion analyzing over 130 years of Michigan water-law cases. The panel concluded that long-standing Michigan precedent involving both riparian and groundwater law supported the use of a flexible reasonable-use balancing test to all disputes between water users, and applied that test to resolve the case. This Court did not disturb that holding on appeal.

Now, more than three years after the decision in *Nestlé* became final, Appellants argue that decision should be overturned, claiming that the "unprecedented" application of the reasonable-use balancing test has "erased traditional reasonable use and correlative rights principles of water law." (Appellants' Br, p 2.) Contrary to their contentions, however, it is Appellants who seek to overturn over 130 years of Michigan water law by urging this Court to adopt an unprecedented standard that is not, and never has been, the law in Michigan.

A. THE COURT OF APPEALS' HOLDING IN MICHIGAN CITIZENS, REGARDING THE PROPER TEST TO BE APPLIED IN A DISPUTE BETWEEN A GROUNDWATER USER AND A RIPARIAN, IS NOT AN ISSUE AND MAY NOT BE "RE-APPEALED" IN THIS CASE.

The Court of Appeals decided *Nestlé,* which applied a reasonable use balancing test to adjudicate a dispute between a riparian (Michigan Citizens for Water Conservation) and a groundwater user (Nestlé Waters North America), nearly four years ago. This Court left the

Court of Appeals' water law determinations undisturbed on appeal. For the reasons set forth by Defendant Appellee MDEQ in its Brief on Appeal, it would be entirely inappropriate for this Court to now allow Appellants to "re-appeal" that decision in this case, which involves solely a dispute between two riparians. (MDEQ Brief on Appeal, pp 9-10.)

B. IN APPLYING THE REASONABLE-USE BALANCING TEST TO THE DISPUTE BETWEEN TWO RIPARIANS IN THIS CASE, THE COURT OF APPEALS ADHERED TO WATER LAW PRECEDENTS OF THIS COURT DATING BACK OVER A CENTURY.

1. Riparian Users.

Michigan courts have been applying a flexible reasonable-use test to conflicts between water users since this Court's 1874 decision in *Dumont v Kellogg*, 29 Mich 420 (1874). In *Dumont*, defendant constructed a dam across a stream, which detained the waters of the stream and caused injury to plaintiff, a lower riparian owner who operated a mill downstream. *Id.* at 420. The trial court instructed the jury based on the natural flow rule for determining conflicts over water use,[5] and this Court reversed. *Id.* at 421. Justice Cooley, writing on behalf of a unanimous Court, determined that the proper question was "whether under all the circumstances of the case the use of the water by one is reasonable and consistent with a correspondent enjoyment of right by the other." *Id.* at 424. "There may be and there must be allowed of that which is common to all a reasonable use by each." *Id.* at 425. This Court, therefore, adopted the flexible reasonable-use rule for resolving conflicts between water users that has been the law in Michigan ever since. This Court held:

> "It is . . . not a diminution in the quantity of the water alone, or an alteration in its flow, or either or both of these circumstances combined with injury, that will give a right of action, if in view of all the circumstances, and having regard to equality of right in

[5] As described by the Court of Appeals in *Nestlé,* the natural flow rule has two components: first, a riparian cannot "substantially or materially diminish the quantity or quality of water" in a stream, and second, a landowner cannot transport water "to land beyond the riparian land." 269 Mich App at 55.

> others, that which has been done and which causes injury is not unreasonable. In other words, the injury that is incidental to a reasonable enjoyment of the common right can demand no redress." *Id.*

Subsequent Michigan decisions have recognized *Dumont* as establishing a flexible balancing test in disputes between water users, weighing numerous factors in determining whether a party's use of water resources is a reasonable one. As this Court acknowledged in *People v Hulbert*, 131 Mich 156; 91 NW 211 (1902):

> No statement can be made as to what is such reasonable use which will, without variation or qualification, apply to the facts of every case. But in determining whether a use is reasonable we must consider what the use is for; its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor and of the benefit to the other; and all other facts which may bear upon the reasonableness of the use. *Id.* at 170, quoting *Gehlen v Knorr*, 101 Iowa 700; 70 NW 757 (1897) (quotations omitted).

These considerations were again set out by this Court in *Thompson v Enz*, 379 Mich 667; 154 NW2d 473 (1967). There, the Court found three factors relevant in determining whether a water use was reasonable. First, "attention should be given to the watercourse and its attributes, including its size, character and natural state." *Id.* at 688. Second, the court "should examine the use itself as to its type, extent, necessity, effect on the quantity, quality and level of the water, and the purposes of the users." *Id.* Finally, "it is necessary to examine the proposed artificial use in relation to the consequential effects, including the benefits obtained and the detriment suffered, on the correlative rights and interests of other riparian proprietors and also on the interests of the State, including fishing, navigation, and conservation." *Id.* at 689.

All of this long-standing authority was discussed and relied upon by Judges Smolenski, Murphy, and White in *Nestlé*, and found to be fully consistent with the reasonable-use test. The *Anglers* court did no more than apply that same reasonable-use test to the riparian dispute in this

case, and the standard it applied is thus fully consistent with long-established Michigan precedent regarding conflicts between competing riparian water users.

2. Groundwater Users.

The reasonable use test has also been applied to conflicting groundwater uses in this state for nearly a century. In *Schenk v City of Ann Arbor*, 196 Mich 75; 163 NW 109 (1917), the city purchased land, drilled wells, and was withdrawing more than 3.7 million gallons of water per day for transportation to the city and use by its inhabitants. *Id.* at 77-78. Plaintiff, who owned property near the land on which the city installed the wells, alleged that the city's pumping caused his wells to go dry, that flowing wells in the area had slowed or also gone dry, and that agricultural productiveness and land values were harmed. *Id.* at 78-79. After surveying (and quoting at length) the law in England and various states, this Court adopted the "rule of reasonable use" for resolving the dispute. *Id.* at 91. Specifically, the Court held that the city could "reasonably make use, for the purpose intended, of a large volume of water from this land," and it therefore refused to reverse the trial court's rejection of an injunction. *Id.* at 92. The Court explicitly noted that the city did not use the water "upon, or for the benefit of, the land from which it takes it," *id.* at 81, implicitly rejecting versions of the reasonable-use rule that imposed a limitation based on the place of groundwater use. *See id.* at 84, 87.

Similarly, in *Bernard v City of St Louis*, 220 Mich 159; 189 NW 891 (1922), plaintiffs' hotel operated as a sanitarium adjacent to land owned by the city. For 50 years, water from a well had flowed into the hotel, where it was used for its supposed curative properties. After the city installed wells on its adjoining land to provide water to its residents, the flow of water into the hotel slowed substantially. *Id.* at 160-62. In denying plaintiffs' request for an injunction and ruling that plaintiffs were entitled to reimbursement for the expenses incurred as a result of the city's wells, the Court applied the reasonable-use rule articulated in *Schenk*. *Id.* at 165.

Specifically, the Court noted that "if the city makes a reasonable use of the percolating waters, and the plaintiffs do not permit it to go to waste, there will . . . nearly all of the time be an ample supply for the needs of both." *Id.* at 163.

Thus, the Court of Appeals' decision in *Nestlé* is fully consistent with the long-standing precedents of this Court concerning disputes between groundwater users, which also apply the reasonable-use test.

C. THE COURT OF APPEALS ADHERED TO ITS OWN PRECEDENT IN APPLYING THE REASONABLE-USE BALANCING TEST.

Not only did the Court of Appeals in this case and in *Nestlé* apply over 100 years of precedent from this Court in making their respective determinations, they also relied on previous Court of Appeals precedent in *Maerz v United States Steel Corp*, 116 Mich App 710; 323 NW2d 900 (1982). In *Maerz*, defendant operated a quarry and removed large quantities of groundwater via pumps. *Id.* at 711-12. Plaintiffs alleged that the removal of the groundwater dried up their wells. *Id.* at 712. The trial court granted summary disposition for defendants because they used the water on-site. The Court of Appeals reversed, concluding that the court had erred in failing to evaluate defendants' use of groundwater under Michigan's reasonableness standard. *Id.* at 720. *Maerz* explicitly rejected a water use rule that employed a rigid on-site/off-site distinction, *id.* at 715-20, and recognized that Michigan's reasonableness standard does not distinguish between on-tract and off-tract users. *Id.* at 714-20. The court concluded that the principles set

forth in the Restatement 2d, Torts § 858[6] were fully consistent with Michigan's reasonable-use test and less arbitrary than the old American rule applied in certain other states. *Id.* at 720.

Thus, in applying this Court's flexible, reasonable-use test to the situations before it, the Court of Appeals panels here and in *Nestlé* were also following their own precedent established in *Maerz* nearly 25 years earlier.

D. BECAUSE THE REASONABLE-USE BALANCING TEST IS FULLY CONSISTENT WITH LONG-STANDING MICHIGAN PRECEDENT, IT SHOULD NOT BE OVERTURNED.

The Court of Appeals, both here and in *Nestlé,* expressly relied on the above precedent in applying the flexible, reasonable-use balancing test. In reiterating the factors used to determine whether a water use is reasonable, the Court of Appeals in each case restated principles that have been expressed in Michigan case law for over a century.

Michigan law applies a flexible reasonable-use test to disputes between competing riparian users, *Dumont*, *supra*, between competing groundwater users, *Schenk*, *supra*, and between a groundwater user and a riparian user, *Nestlé*, *supra*. It is only logical to apply the same reasonable-use test regardless of whether the dispute is between groundwater and/or riparian users. After all, it is a scientific fact that groundwater and surface water comprise a single, inter-connected resource.[7]

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[6] The distinction between on-tract and off-tract use was intentionally eliminated in the Restatement 2d, Torts in order to promote the maximum beneficial use of water. Restatement 2d, Torts § 855 cmt b, as incorporated into § 858. Under the Restatement, the underlying basis for consideration of the place of use [and, in this case, source] of the water is now subsumed within the evaluation of reasonableness. See, e.g., Restatement 2d, Torts, § 855 cmt "A nonriparian use that can be accommodated with riparian uses and causes no substantial harm to them can be reasonable despite its nonriparian character."

[7] *See generally* Winter, *et al*, *Ground Water and Surface Water: A Single Resource* (U.S.G.S. Circular 1139) (1998)available at http://water.usgs.gov/pubs/circ/circ1139/pdf/circ1139.pdf (accessed September 28, 2010).

In sum, the flexible reasonable-use balancing test has been the law of this State for over a century.[8] Appellants' misguided attempt in this case to overturn the *Nestlé* panel's well-reasoned decision should be rejected.

E. THE LEGAL PRINCIPLES ADVANCED BY APPELLANTS ARE NOT NOW AND NEVER HAVE BEEN THE LAW IN MICHIGAN.

Although Appellants claim that the Court of Appeals in *Nestlé* (and presumably in this case as well) "veered . . . far from the basic principles of Michigan water law" (Appellants' Br, p 1), in fact it is Appellants who are attempting to convince this Court to depart from the long-established water-law principles of this State. Contrary to Appellants' erroneous assertions, the principles they espouse have never been the law in Michigan and find no support in the precedents of this Court.

1. Appellants Have Grossly Misinterpreted Michigan Precedent.

Michigan courts have "consistently avoided strict rules" that grant preferences to one class of water user over another. *Nestlé*, 269 Mich App at 67. Instead, Michigan courts have adopted a flexible reasonable-use balancing test that takes into account a wide range of factors in achieving a "fair participation" for all water users in the resource. *See id.* at 69. Appellants, however, implausibly assert that the reasonable-use balancing test applies only in a narrow set of circumstances. Appellants erroneously claim that the reasonable-use test "does *not* extend to competing uses or users of water that are non-riparian or out of the watershed." (Appellants' Br, p 12 (emphasis in original).) In such instances, Appellants contend, "the test focuses on whether the use is a diversion for non-riparian property, hence unreasonable per se, or out of the

[8] Appellants disingenuously claim that the Court of Appeals in *Nestlé* "failed to explain" how it made its "leap" from *Dumont* to the reasonable-use balancing test, or how it arrived at its conclusion that Michigan courts have "sought to ensure the greatest possible access to water resources for all users." (Appellants' Br, p 12.) The Court of Appeals, in fact, devoted more than 30 pages of its opinion to an exhaustive, comprehensive, and detailed analysis of Michigan riparian and groundwater law, which explains in great depth the development of the reasonable-use test through more than a century of Michigan precedent.

watershed, and if so, whether the flows, levels, and characteristics of a stream would be measurably diminished or impaired."[9] *Id.* at 12-13 (internal citations omitted). As demonstrated below, in order to reach this strained interpretation, which has never been the law in Michigan, Appellants are forced to significantly distort the precedents of this Court.

Appellants first purport to find such a standard in dicta in *Dumont*. In *Dumont*, the Court distinguished the facts of that case from two other scenarios involving conduct it thought actionable:

> "[This case] differs essentially from [1] a case in which a stream has been diverted from its natural course and turned away from a proprietor below. . . . It differs, also, from [2] the case of an interference by a stranger, who, by any means, or for any cause, diminishes the flow of the waters. . . ." 29 Mich at 422.

From this language, Appellants contend that "Michigan water law has always recognized distinctions between uses of water on-tract or within the source watershed and uses of water off-tract or of [*sic*] the watershed." (Appellants' Br, p 13.)

Appellants' interpretation simply cannot be extrapolated from the language quoted above. The *Dumont* dicta says nothing about *where* the diverted water is used. Water from a stream diverted from its natural course might be used on the tract in question (*e.g.*, to irrigate crops) or it might be used off-tract (*e.g.*, sent to a city miles away to be used for municipal purposes). The *Dumont* dictum would apply in both circumstances, and therefore it does not make the situs of use definitive in resolving water disputes. The second scenario referred to in the *Dumont* dictum is unhelpful to Appellants because it simply states that a *stranger* cannot diminish the flow of

[9] Appellants claim that this standard is "exactly what the trial court . . . held" in *Nestlé*. (Appellants' Br, p 13 n51.) Tellingly, however, the trial court itself in *Nestlé* conceded that this standard "has not been announced by any reported Michigan case to date." *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, Mecosta County Circuit Court Case No. 01-14563-CE Trial Court Op., p. 47, available at http://www.ecobizport.com/NestleRootOpinion.pdf (accessed September 28, 2010).

riparian waters. 29 Mich at 422. As between two holders of property rights, *Dumont* applies the reasonable-use rule. *Id.* at 425.

Appellants' interpretation of Michigan groundwater law is similarly misguided. First, *Schenk* and *Maerz* both adopted a reasonable-use rule for groundwater disputes that did not distinguish based on whether the water was being used on- or off-tract. In *Schenk*, plaintiff alleged that his wells had been depleted by the City of Ann Arbor's withdrawals of groundwater for municipal use. 196 Mich at 78-79. Little, if any, of the groundwater pumped by the city was used on-tract, because the water was pumped miles away to be sold and used in Ann Arbor. *Id.* at 81. This Court nevertheless applied the reasonable-use test and not the correlative rights theory or any other doctrine.[10] *Id.* at 91. Moreover, this Court refused to enjoin the off-tract use of the water at issue. Likewise, in *Bernard*, this Court also refused to enjoin off-tract use of groundwater. The Court of Appeals adhered to this reasoning in *Maerz*, where it specifically rejected the on-site/off-site distinction embodied in an archaic formulation of the reasonable-use rule adopted in certain other states, but never in Michigan.[11] 116 Mich App at 715-20. The Court of Appeals in *Nestlé* did not interpret *Maerz* as a "shift" in groundwater law, as Appellants erroneously contend. (Appellants' Br, pp 17-18.) Rather, as the Court of Appeals properly recognized in *Nestlé*, *Maerz* expressly stated that the reasonable use principles found in § 858 of the Restatement were consistent with prior Michigan law. *Maerz*, 116 Mich App at 720.

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[10] Appellants' confusion regarding *Schenk* appears to stem from their contention that *Schenk* cited "approvingly" a California correlative rights decision, *Katz v Walkinshaw*, 141 Cal 116; 70 P 663 (1903), which Appellants claim "sheds light on the importance the Court has placed on limiting off-tract diversions or use of water to protect the uses and riparian water bodies of the on-tract owner." (Appellants' Br, p 14 n54.) However, the Court merely quoted *Katz* as part of a canvassing of out-of-state authorities. Such quotation does not establish approval of the quoted language. *See Little v Kin*, 249 Mich App at 510, n4. Tellingly, not a single Michigan case besides *Schenk* has cited *Katz*.

[11] As the Court of Appeals in *Nestlé* properly recognized, *Maerz* unfortunately mislabeled the reasonable-use test as involving "correlative rights." 269 Mich App at 65, n 39. Appellants contend that the Court of Appeals "had it backwards." (Appellants' Br, p 19.) However, courts of other states and commentators alike have recognized that *Maerz* applied the flexible reasonable-use rule. *See, e.g., Maddocks v Giles*, 728 A2d 150, 153 (Me 1999); 3 Beck, ed, *Waters and Water Rights* (1991 ed, 2003 repl vol), p 19-47.

Moreover, there is simply no precedent in this state that can be read as adopting a correlative rights theory. Under the correlative rights rule, "landowners' rights are coequal and *proportionate* to their overlying ownership." 3 Beck, ed, *Waters and Water Rights* (1991 ed, 2003 repl vol), p 19-45 (emphasis added). Thus, "even if the water being pumped is used beneficially on the user's land, *the user cannot exceed the proportionate share*, because this would infringe on the proportionate rights of the other overlying landowners." *Id.* (emphasis added). Such concern for the proportionality of the use—the hallmark of the correlative rights rule—is found nowhere in *Dumont*, *Schenk, Maerz*, or any other Michigan case.

Finally, Appellants' contention that the reasonable-use balancing test does not extend to competing water uses that are non-riparian would subordinate groundwater uses to riparian uses. This is exactly the incorrect ruling made by the trial court in *Nestlé* that was overturned by the Court of Appeals. 269 Mich App at 68 n43. "Michigan courts have consistently avoided" rules that grant categorical preferences to one class of water user over another. *Id.* at 67.

2. Appellants Misinterpret The Factors To Be Considered Under The Reasonable Use Balancing Test.

Even in those situations where Appellants concede the applicability of the reasonable-use balancing test, they misconstrue the nature of the test. The Court of Appeals in *Nestlé* set forth in great detail the various factors to be considered in applying the reasonable-use balancing test, as developed over the course of more than 130 years of Michigan water-law precedent. 269 Mich App at 69-74. Appellants, however, seek to make one factor determinative and exclude another factor altogether. Neither argument has any support under Michigan law. The Court should therefore reject Appellants' interpretation of the balancing test, which selectively includes only those factors that Appellants deem worthy of consideration.

a. On-Tract/Off-Tract Use.

Not satisfied with allowing a court to factor the situs of use into the reasonable-use balancing test, Appellants insist that whether the water is used on- or off-tract must be controlling. But while Michigan courts have long weighed the location of use in determining reasonableness under the balancing test, they have refused to hold this factor determinative. For example, in *Hart v D'Agostini*, 7 Mich App 319; 151 NW2d 826 (1967), the Court of Appeals held that defendants' installation of a sewer trunk line near plaintiffs' property, which temporarily lowered the water table and caused plaintiffs' wells to go dry, was reasonable. *Id.* at 321-23. Among the factors influencing the court's reasonableness determination was the fact that the water was not being transported to distant premises for consumption, but also the fact that the interference with plaintiffs' water supply was only temporary; the dewatering was essential to the construction of the sewer; and the sewer benefited the entire area. *Id.*; *see also Maerz*, 116 Mich App at 719-20.

Similarly, in *Thompson v Enz*, *supra*, this Court, while noting in passing that use of surface water for an artificial purpose must ordinarily be only for the benefit of the riparian land, 379 Mich at 686-87, also relied on numerous other factors in determining reasonableness. Among them were the size, character, and natural state of the waterway; the type, extent, necessity, and effect of the use; and a weighing of the harms and benefits of the use on other riparian proprietors. *Id.* at 688-89. Again, *Hart* and *Thompson* considered all relevant factors in deciding whether a water use was reasonable and found no one factor determinative.

The Court of Appeals adhered to these precedents in *Nestlé* when it stated that "the court should consider whether the use is for an artificial or a natural purpose and whether the use benefits the land from which the water is extracted" when analyzing the purpose of the use under the reasonable-use balancing test. 269 Mich App at 71. Accordingly,

> "[I]n order to ensure that the needs of local water users are met first, water uses that benefit the riparian land or the land from which the groundwater was removed are given preference over water uses that ship the water away or otherwise benefit land unconnected with the location from which the water was extracted." *Id.* at 72.

In setting forth the relevant determinations under the reasonable-use balancing test, the Court of Appeals recognized that, "at least in the context of riparian rights, prior courts have determined that uses that did not benefit the riparian land were unreasonable per se." *Id.* at 72 n49. However, the court found that "such a per se rule is incompatible with modern use of the balancing test. Instead, we hold that the location of the use is but one of the factors that should be considered in balancing the relative interests." *Id.* This holding is consistent with the development of Michigan riparian and groundwater law as traced in great detail by the court earlier in its opinion.

Finally, Appellants' distinction between on- and off-tract uses is irrational. Under Appellants' conception of Michigan water law, incorporation of water into products would be per se unreasonable because those products are sold off-tract. On the other hand, Appellants concede that farmers' irrigation of their crops would be considered an on-tract use that avoids the per se prohibition. (*See* Appellants' Br, p 25.) But such a distinction in treatment between these uses makes no sense. In many irrigated areas, approximately 75 to 85 percent of the applied water is lost to evapotranspiration and/or is retained in the crops.[12] Winter, *supra* note 2, at 57. Water lost through evapotranspiration will be returned to the earth as precipitation off-tract (and usually out of the watershed), and water-retaining crops will be harvested and sold off-tract (and usually out of the watershed). Thus, any rule that makes the location of the use determinative will be wholly arbitrary.

[12] For instance, potatoes consist of about 80 percent water. U.S. Department of Agriculture, *Specialty Potatoes*, *available at* http://sfp.ucdavis.edu/pubs/brochures/specialtypotatoes.html (accessed Sept. 13, 2010).

Accordingly, while the location of the use is properly a factor in the reasonable-use balancing test, and that standard prefers on-tract uses, Appellants' position that the location of the use is determinative is not now and has never been the law of Michigan.

b. Economic And Social Benefits Of The Use.

Appellants also attempt to read the consideration of the economic and social benefits of the water use out of the balancing test altogether. Appellants claim that "this Court has never adopted a social or economic benefit test that can be used to outweigh the harm to, or interference with the use of, a lake, stream, or tributary groundwater." (Appellants' Br, p 21.) Once again, Appellants are demonstrably mistaken, as the Court of Appeals' consideration of economic and social benefits is firmly rooted in the case law of this Court.

In setting forth the factors to be considered under the reasonable-use balancing test, the Court of Appeals relied extensively on this Court's decisions in *Hulbert*, *supra*, and *Thompson*, *supra*, which discussed the relevant factors in detail. It is clear from a reading of *Thompson* that the economic or social benefits of a water use are encompassed within "the purpose of the use" factor discussed in *Thompson*. 379 Mich at 688-89; *see also Hart*, 7 Mich App at 323 (noting that the use in question benefited the area). Indeed, this Court itself held in *People v Hulbert*, *supra*, that *all* factors should be considered when determining the reasonableness of a given water use. 131 Mich at 170 ("in determining whether a use [of water] is reasonable we must consider what the use is for; its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor and of the benefit to the other; *and all other facts which may bear upon the reasonableness of the use*.") (emphasis supplied) (quotation omitted).

Economic and social benefits of a water use are also components of the Restatement analysis. *Maerz* held that "the principles expressed in the Restatement . . . should be followed in

Michigan," 116 Mich App at 720, and the Court of Appeals in *Nestlé* used the Restatement "as an aid to understanding the role of these factors in the balancing test" because of the "many similarities" between the Restatement test and the reasonable-use balancing test. 269 Mich App at 71 n46. Accordingly, the economic and social benefits of a water use have long been a component in the reasonable-use balancing test under Michigan law.

The *amicus* brief filed by the Michigan Council of Trout Unlimited ("Trout Unlimited") mistakenly contends that "reliance on economic factors will always result in a finding of reasonableness at the expense of riparian owners." (Trout Unlimited Br, p 22.) Without citing any evidence, Trout Unlimited sweepingly asserts that the reasonable-use balancing test "gives substantial weight to the economic benefits of a commercial use of a lake or stream to the exclusion of the benefits of the uses of the riparian owners and ignores the harms caused by the commercial use," so that "whenever a commercial or industrial endeavor argues that its use of a lake or stream will produce jobs and bring money to the local economy, the use will be allowed at the expense of other riparian uses and the fisheries contained therein." *Id.*

This concern, however, is refuted by *Nestlé* itself, which found the proposed commercial use at issue *unreasonable* under the balancing test. Nestlé had been issued a permit to pump groundwater from four wells at a maximum combined pumping rate of 400 gallons per minute ("gpm"). 269 Mich App at 36. After exhaustively tracing the development of the reasonable-use balancing test and considering all relevant factors, Judges Smolenski, Murphy, and White unanimously concluded that the proposed withdrawal of 400 gpm was "more than a fair participation" and "unreasonable under the circumstances." *Id.* at 78. Having found that Nestlé's proposed pumping unreasonably interfered with plaintiffs' riparian rights in a nearby stream, the court enjoined Nestlé from pumping at 400 gpm and remanded for a determination of

a reduced pumping rate that would satisfy the reasonable-use test. *Id.* at 79-82. Thus, the Court of Appeals took the economic benefits of Nestlé's use into account, but concluded that the harms to the riparian owners outweighed those economic benefits and determined that the use was unreasonable under the balancing test. As *Nestlé* demonstrates, Trout Unlimited's fear that harms to riparian owners will always be ignored at the expense of the economic benefits of the use is completely unfounded.

Appellants' selective interpretation of the factors to be considered under the reasonable-use balancing test cannot withstand scrutiny. This Court should reject Appellants' attempt to pick and choose which factors are considered and the weight they are given, and weigh all relevant factors in the balancing equation as contemplated by the relevant case law.

3. Appellants' Out-Of-State Authority Is Inapposite.

Unable to find support for their strained interpretations in Michigan water law, Appellants rely on cases decided in other states, particularly "eastern states," and insist that the law in Michigan must be similar. (Appellants' Br, p 20.) The fundamental problem with Appellants' argument is that none of these jurisdictions apply Michigan's flexible version of the reasonable-use test. Rather, each case applied state law markedly different from Michigan's—either the rigid and archaic "American rule"[13] (which is really a modification of the discarded rule of capture, and which was applied in several eastern states) or a standard that is not based on reasonableness at all.[14] Water law principles from other states cannot rationally be mixed and matched as Appellants suggest. Because Michigan has never followed the harsh, antiquated tests

[13] *See, e.g., Martin v City of Linden*, 667 So 2d 732, 734 (Ala 1995); *Rothrauff v Sinking Spring Water Co*, 339 Pa 129; 14 A2d 87 (1940).

[14] *See, e.g., Collens v New Canaan Water Co*, 155 Conn 477, 483-84; 234 A2d 825 (1967).

adopted by these states, such authority cannot be used to superimpose distinctions onto Michigan's reasonable-use test which have never been placed there by any Michigan court.

4. Appellants' Erroneous Rule Would Negatively Impact Property Owners and Businesses Throughout The State.

Appellants make the sweeping conclusion that overturning the reasonable-use balancing test "will not affect farmers, manufacturers, industry, homeowners, utilities or municipalities." (Appellants' Br, p 25.) This conclusory statement is entirely devoid of any support and is flatly wrong. As demonstrated by the *amicus* participation in both the *Nestlé* case and the present case, the business community and economic development agencies view Appellants' arguments, if adopted, as serious threats to property rights, economic development and stability, and jobs.[15]

Manufacturers, representing a large base of employers, would be harmed by Appellants' proposed rule because they are heavily dependent on water. Industrial users withdraw over 629 million gallons of fresh water per day in Michigan. U.S. Geological Survey, *Estimated Use of Water in the United States in 2005*, p 33 (2009).[16] "Industrial water use includes water used for such purposes as fabricating, processing, washing, diluting, cooling, or transporting a product; incorporating water into a product; or for sanitation needs within the manufacturing facility." *Id.* at 32. Industries that use large amounts of water include the food, paper, chemical, refined petroleum, and primary metals industries. *Id.* The vast majority of products requiring such water are sold off-tract, and the vast majority of other industrial uses also occur off-tract. Therefore, many industries would be severely impacted by Appellants' novel water-law rules.

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[15] In the *Nestlé* case alone, *amicus* briefs in opposition to the same water-law principles advanced by Appellants here were filed by the MMA, the Michigan Chamber of Commerce, Michigan Chemistry Council, Michigan Agri-Business Association, Michigan Works! West Central, the Mecosta Area Chamber of Commerce, and the Michigan Association of Realtors.

[16] *Available at* http://pubs.usgs.gov/circ/1344/pdf/c1344.pdf (accessed September 22, 2010).

Even more water, over one billion gallons per day in Michigan, is used as publicly-supplied water. *Id.* at 7. For instance, a large number of Michigan municipalities have followed the example of Ann Arbor in *Schenk* and pump water off-tract to supply their citizens with water for domestic or commercial use. Thus, many industrial users obtain their water from a public source. Public-supply water is also used for public services such as pools, parks, firefighting, wastewater treatment, and public buildings. *Id.* at 16. A large percentage of domestic water users also obtain their water from a public source and use the water for drinking, food preparation, bathing, washing clothes and dishes, flushing toilets, and watering lawns and gardens. *Id.* at 19. All of these activities would be jeopardized under Appellants' preferred version of the law.

Finally, over nine billion gallons of fresh water are used in Michigan each day for electrical power. *Id.* at 39. Most of this water is derived from surface water and used for once-through cooling at power plants. *Id.* at 1. To the extent that such water is used off-tract, electricity generators would also be affected by Appellants' water-law standards.

While Appellants concede that jobs and taxes may be important (Appellants' Br, p 23), the water-law rules they propose are hostile to manufacturers' use of water. The last thing Michigan needs in the current economic climate is a judicial decision that overturns a century of water law and, in the process, destroys manufacturing jobs.

F. THE REASONABLE-USE BALANCING TEST APPLIES TO ALL DISPUTES BETWEEN AND AMONG RIPARIAN AND GROUNDWATER USERS.

Appellants incorrectly contend that the reasonable-use balancing test does not apply to disputes between two riparians, as *Nestlé* involved a dispute between riparian users and a groundwater user. (Appellants' Br, pp 27-28.) Contrary to Appellants' contentions, however, as

the Court of Appeals recognized in both this case and *Nestlé*, the reasonable-use balancing test applies to all competing water uses, whether between two riparians, two groundwater users, or a riparian and a groundwater user. Indeed, the *Nestlé* panel specifically held that:

> [U]nder Michigan's riparian authorities, water disputes between riparian proprietors are resolved by a reasonable use test that balances competing water uses to determine whether one riparian proprietor's water use, which interferes with another's use, is unreasonable under the circumstances." 269 Mich App at 58.

After considering in great detail the development and application of the relevant Michigan precedents, Judges Smolenski, Murphy, and White unanimously determined that the same flexible reasonable-use balancing test also applied to disputes between competing groundwater users, *id.* at 61-62, and between riparian and groundwater users, *id.* at 67-68.

Applying the same test to all water uses is logical in light of the scientific reality that groundwater and surface water comprise a single, inter-connected resource. *See generally* Winter, *supra* note 2. Other authorities agree. *See State v Michels Pipeline Constr, Inc*, 63 Wis 2d 278, 292; 217 NW2d 339 (1974) ("It makes very little sense to make an arbitrary distinction between the rules to be applied to water on the basis of where it happens to be found."); Restatement 2d, Torts § 858, cmt g, p 264 (explaining that the Restatement "merges . . . into a single rule" the law governing surface water and groundwater). Accordingly, Appellants are incorrect in their assertion that a different rule applies to a dispute between two riparian users.

G. THE PUBLIC TRUST DOCTRINE IS INAPPLICABLE.

Amicus Trout Unlimited erroneously contends that the Court of Appeals' decision in this case violates the public trust doctrine. (Trout Unlimited Br, pp 22-25.) As an initial matter, neither the trial court nor the Court of Appeals addressed the public trust doctrine. Moreover, any claim under the public trust doctrine is subsumed by Appellants' MEPA claim. *Highland*

Recreation Defense Found v Natural Res Comm'n, 180 Mich App 324, 331; 446 NW2d 895 (1989) ("We also agree that the claims raised by plaintiff under its public trust argument are duplicative of its claims under MEPA. No further discussion of those claims is therefore required."). Therefore, this Court should ignore Trout Unlimited's attempt to interject the public trust doctrine into this case. The public trust doctrine is simply inapplicable to this case.

First, the public trust doctrine applies only to navigable waters, and not to all waters of the state. *Bott v Comm'n of Natural Res*, 415 Mich 45, 71; 327 NW2d 838 (1982). Waters are navigable if, in their natural state, they are capable of supporting commercial shipping or floating large mill logs. *Collins v Gerhardt*, 237 Mich 38, 43; 211 NW 115 (1926); *Thunder Bay River Booming Co v Speechly*, 31 Mich 336, 343 (1875); *Moore v Sanborne*, 2 Mich 519, 526 (1853). The Court re-affirmed this standard nearly 30 years ago in Justice Levin's well-reasoned opinion in *Bott*. 415 Mich at 60; *see also Nestlé*, 269 Mich App at 102. Here, because neither court addressed the public trust doctrine below, there is no evidence in the record that the relevant water bodies are capable of supporting commercial shipping or the floating of large mill logs. Thus, the public trust doctrine cannot be applied.

Second, the public trust doctrine does not apply to non-navigable waters that contribute to a navigable body of water. For instance, in *Burroughs v Whitwam*, 59 Mich 279; 26 NW 491 (1886), the Thread River was found non-navigable and therefore not subject to the public trust doctrine, even though the waters from the stream flowed into the navigable waters of the Great Lakes, the St. Lawrence River, and beyond. The Court found that "[b]ecause the waters of the Thread eventually find their way through the Lakes to the St. Lawrence can have no bearing upon the question of its navigability." *Id.* at 283. The public trust doctrine does not extend to "every little rill or brook, whose waters finally reached these great rivers." *Id.*; *see also Mich*

Conference Ass'n of Seventh-Day Adventists v Comm'n of Natural Res, 70 Mich App 85, 88; 245 NW2d 412 (1976) (navigability of lake not determined by navigability of its outlet creek). Without any record evidence that the tributary waters in this case are navigable themselves, the public trust doctrine is inapplicable.

Finally, even if the public trust doctrine were to be applied, Michigan law does not impose a *per se* prohibition on any actions that impact, to any extent, water impressed with the public trust. Rather, in adjudicating the competing rights of riparian owners and members of the public in the use of a waterway, Michigan law requires plaintiffs to prove unreasonable impairment of public trust resources. The leading case applying this standard is *Thunder Bay*, *supra*, where this Court held that when the public trust attaches, "the public right of floatage and the private right of the riparian proprietors must each be exercised with due consideration for the other . . . ." 31 Mich at 344. Similarly, in *Middleton v Flat River Booming Co*, 27 Mich 533 (1873), the Court concluded that "it cannot be said that the right of floatage is paramount to the use of [riparian owners]. Each right should be enjoyed with due regard to the existence and protection of the other." *Id.* at 535. As Justice Cooley explained, "[t]he rights of the public to run logs in the stream are not subordinate to those of the owner of the bank, but they are concurrent, and each must be enjoyed reasonably and without any unnecessary interference with the enjoyment of the other, and without negligence." *White River Booming Co v Nelson*, 45 Mich 578, 583-84; 8 NW 909 (1881) (Cooley, J., concurring).

Again, there is no record evidence demonstrating any, let alone unreasonable, impairment of the purported public trust resources for purposes of navigation, commerce, or fishing. Accordingly, the Court should decline Trout Unlimited's invitation to inject the public trust doctrine at this stage of the litigation.

III. THIS COURT WAS CORRECT IN HOLDING THAT A PERMITTING DECISION IS NOT "CONDUCT" UNDER THE MICHIGAN ENVIRONMENTAL PROTECTION ACT IN PRESERVE THE DUNES

The Court of Appeals held that Appellants did not have a cause of action against the MDEQ under MEPA, because the complained-of action of MDEQ was not "conduct," that has "polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources" as required by the unambiguous language of MEPA, MCL § 324.1703. This holding was directly in line with this Court's decision in *Preserve the Dunes v Dep't of Envt'l Quality*, 471 Mich 508; 684 NW2d 847 (2004). Because this Court's ruling in *Preserve the Dunes* that an administrative action by the MDEQ, without more, is not "conduct" under MEPA was correct, this Court should affirm the Court of Appeals' holding with respect to Appellants MEPA claim against the MDEQ.

A. OVERVIEW OF MEPA

MEPA provides a statutory vehicle for Michigan citizens to sue for declaratory and other equitable relief to protect Michigan's natural resources from pollution, impairment or destruction. See, e.g., *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 304-305; 224 NW2d 883 (1975). To prevail on a MEPA claim, the plaintiff must first make a "prima facie showing that the **conduct** of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources." See *Nemeth v Abonmarche Development, Inc*, 457 Mich 16, 24; 576 NW2d 641 (1988), quoting MCL § 324.1703 (emphasis added). The defendant may then rebut the plaintiff's *prima facie* case with "evidence to the contrary," or by showing, as an affirmative defense, "that there is no feasible and prudent alternative to defendant's **conduct** and that his or her **conduct** is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount

concern for protection of its natural resources . . . ."[17] MCL § 324.1703(1) (emphasis added). Accordingly, MEPA's sole focus is on a defendant's **conduct** and its effect or likely effect on natural resources.

There is no specific standard for measuring whether a defendant's conduct has, or will likely, pollute, impair, or destroy natural resources. *Nemeth*, *supra* at 30. Rather, "each alleged MEPA violation must be evaluated by the trial court using the pollution control standard appropriate to the particular alleged violation." *Id.* at 35. To determine whether a violation has occurred, MEPA requires the trial court to consider the "validity, applicability, and reasonableness" of any existing standard in assessing the effect, or likely effect, of the defendant's conduct based on a "standard." MCL § 324.1701(2). Depending on the facts of the case, if the Legislature (or some other state body) has already articulated an applicable pollution control standard, then the court may use the legislative standard to assess whether the defendant's conduct has, or will likely, pollute, impair, or destroy natural resources—provided that the adopted standard is determined to be "valid, applicable, and reasonable in accordance with the courts' development of the common law of environmental quality." *Id.* On the other hand, where no appropriate legislative standard exists, MEPA empowers the courts to determine whether there is, or will be, an adverse environmental effect and to draft their own standard. See *Nemeth, supra* at 30-31.

However, in *all* MEPA cases, regardless of whether the court ultimately decides to adopt a standard, the essential question before the court is whether **conduct** does, or is likely to, pollute, impair, or destroy natural resources. See, e.g., *Nemeth*, *supra* at 32, quoting *West Michigan Envt'l Action Council v Natural Resources Comm'n*, 405 Mich 741, 760; 275 NW2d

[17] The rebuttal and affirmative defense provisions of MEPA were intended to weed out "frivolous claims." *Nemeth, supra* at 36 n 10.

538 (1978) (explaining that "[t]he real question before us is when does such impact rise to the level of impairment or destruction?").

MEPA also provides an avenue for citizen participation in the permitting process. Under § 1705 of MEPA, a citizen may "intervene as a party" in an "administrative, licensing, or other" proceeding (or in the "judicial review" of such a proceeding) for the specific and limited purpose of "filing a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources."[18] See MCL § 324.1705(1). Obviously, such intervention can only occur while the proceedings are taking place. After that time, the administrative proceedings are final (unless challenged under the Michigan Administrative Procedures Act, MCL § 24.201 *et seq.*), and MEPA limits a person to a subsequent action for equitable relief only based upon the effect, or likely effect, of the defendant's "conduct." See MCL § 324.1703(1).

B. THE MDEQ CANNOT BE SUBJECT TO A MEPA CLAIM FOR AN ADMINISTRATIVE DECISION

In this case, the Court of Appeals held that the MDEQ was not a proper defendant to the Plaintiffs' MEPA claim, because the MDEQ's approval of Merit Energy's permit is not "conduct" as defined by MEPA. Accordingly, Appellants cannot state a clam against the MDEQ under MEPA. Therefore, this holding was not only correct, but also in line with this Court's prior holding in *Preserve the Dunes, supra:*

> DEQ determinations of permit eligibility ... are unrelated to whether the applicant's proposed activities on the property violate MEPA. Therefore, MEPA provides no private cause of action in circuit court for plaintiffs to challenge the DEQ's determinations

[18] Pursuant to MCL § 324.1706, and as discussed below, this avenue is supplemental to the administrative appeal process under the Michigan Administrative Procedures Act, MCL § 24.201 *et seq.*, which provides additional opportunities for citizens to participate in the permitting process.

> of permit eligibility .... An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA.

Id. at 519. This holding was proper, and, contrary to Justice Kelly's dissent in *Preserve the Dunes*, this holding was not contrary to any prior decision under MEPA.[19]

Moreover, this holding makes sense; it is not a **permit** that impairs a natural resource, but rather the **permitted conduct**. A permit alone cannot harm the environment. Consider, for example, a permit granted by the MDEQ for the filling of wetlands as a precursor to a commercial development. If the developer's financing falls through (an unfortunately all-too familiar scenario in the current economy), or the property is foreclosed, the permitted conduct will never actually occur. The permit is clearly of no moment; it is the conduct to which MEPA was intended to apply. If a permit holder's operations impair natural resources in violation of MEPA, that action can be enjoined, regardless of a permit's facial validity. Conversely, if the operations do not impair natural resources (as the trial court found here), then there is no MEPA claim at all.

Restricting MEPA claims to actual conduct (as opposed to mere administrative action) also makes practical sense. If a permit is issued, and the permitted conduct is the subject of a MEPA claim, and a court determines that the permitted conduct violates MEPA, then the permittee can adjust its conduct – or be ordered to adjust its conduct – accordingly. However, once the MDEQ has issued a permit and the administrative appeal period has expired, the

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[19] In support of now Chief Justice Kelly's assertion in her dissent that *Preserve the Dunes* was "contrary to this Court's earlier MEPA decisions," (*Preserve the Dunes*, supra at 526) she cited to *Eyde v Michigan*, 393 Mich 453, 454; 225 NW2d 1 (1975), *Ray v Mason Co Drain Comm'r*, *supra*, *West Michigan Envt'l Action Council*, *supra* and *Nemeth v Abonmarche Dev, Inc*, *supra*. *Preserve the Dunes,* 471 Mich 508 at 526, fn. 10. However, *Eyde* involved a claim for an injunction against the construction of a sewer, and whether the **project** would pollute or impair natural resources; at issue in *Ray* was a proposed drain project (not a permit), *West Michigan Envt'l Action Council* addressed the drilling of exploratory wells, and *Nemeth* involved construction that allegedly violated the Soil Erosion and Sedimentation Control Act. None of these cases held that a MEPA claim under § 1701 could extend to enjoin or invalidate a permitting decision.

permit holder must be able to rely upon the permit in investing substantial time and resources into the permitted project. If, then, the permitted conduct violates MEPA as a substantive matter, that challenge can be brought at any time. However, MEPA can not reasonably be construed to intend to place a company's investment at risk **indefinitely** on the off chance that a plaintiff could claim that the MDEQ erred in issuing a permit.

This crucial difference between the permit issuing process and the subsequent, substantive permitted conduct (or the difference between the promulgation of administrative rules and conduct permitted by said rules) is also consistent in the statutory standards of judicial review. Review of conduct under MEPA is *de novo. See, e.g., West Michigan Envt'l Action Council* 405 Mich 741 at 749-750. But a court can only set aside an **administrative action** if the action violates Michigan's Constitution or a statute, or if the action is the result of substantial and material errors of law. MCL § 24.306(1)(a), (f); *Barker Bros Const v Bureau of Safety & Regulation,* 212 Mich App 132, 141; 536 NW2d 845 (1995) (noting that circuit court review of an administrative agency's decision is necessarily limited). Review of an administrative action as "conduct" under MEPA simply doesn't fit.

Amicus' position in this regard is not intended to prevent citizens from participating in important administrative proceedings regarding environmental permitting or the promulgation of administrative rules. Rather, *amicus* notes that MEPA already provides a specific avenue for the challenging of a permit or promulgation of an administrative rule under MCL § 324.1705:

> (1) If administrative, licensing, or other proceedings and judicial review of such proceedings are available by law, the agency or the court may permit the attorney general or any other person to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water, or other natural resources or the public trust in these resources.

> (2) In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.
>
> (3) The doctrines of collateral estoppel and res judicata may be applied by the court to prevent multiplicity of suits.[20]

This section of MEPA specifically applies to challenges to licensing and administrative proceedings. It has long been the law in Michigan that:

> where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the legislature are not to be presumed to have intended a conflict.

Crane v Reeder, 22 Mich 322, 334 (1871). The unambiguous language of MEPA, taken as a whole, provides two separate and distinct methods for challenging, on the one hand, actual conduct, and on the other hand, administrative proceedings that may "involve conduct." The Legislature clearly intended to restrict MEPA claims under § 1701 to actual conduct, as *Preserve the Dunes* correctly held.

Moreover, aside from § 1705 of MEPA, citizens already have a constitutionally-protected right to challenge actions of the MDEQ. Mich Const 1963, art VI, § 28, which unambiguously ensures that taxpayers have a constitutional right to appeal final agency decisions directly to the courts, provides:

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[20] As pointed out in the MDEQ's brief in this case, the Appellants did take advantage of this section of MEPA by filing petitions for contested case proceedings to challenge Merit Energy's permit. That those petitions were dismissed did not provide a separate and different cause of action under § 1701 which, quite frankly, does not apply. Moreover, permitting Appellants' MEPA claim in this case to continue would contravene § 1705 (3), which specifically is intended to "prevent multiplicity of suits."

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasijudicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

In exercise of this constitutional right, generally, under Michigan law, an aggrieved party may challenge an administrative body's decision in court (1) by statute, if so provided for; (2) under the Administrative Procedures Act; or (3) by an appeal pursuant to § 631 of the Revised Judicature Act, MCL § 600.631, and Mich Const 1963, art 6, § 28, in conjunction with MCR 7.104(A). These avenues, in conjunction with § 1705 of MEPA are the proper methods for appealing an administrative agencies' decision. In contrast, MEPA was designed specifically to address "conduct" that has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources." MCL § 324.1703.

In disregard of this unambiguous statutory language, Appellants would have this Court effectively transform MEPA into a vehicle by which any person may collaterally challenge a permit long after it has been issued in final form or the promulgation (or lack thereof) of an administrative rule. This would contravene MEPA by completely shifting the focus of MEPA away from the actual effect of a defendant's conduct on natural resources to policy decisions, which are the province of the legislative and executive branches.

If Appellants succeed on this argument, the effect will be to undermine the MDEQ's expertise with respect to their delegated administrative duties, and to remove finality from administrative processes. In addition to monitoring the effect of their conduct on the environment, manufacturers (and other entities) holding issued permits will have to anticipate the

possibility that their permit may be deemed invalid long after the completion of the permit process, even because of mere speculation that the permitted conduct **may** impair a natural resource (or simply because a citizen disagrees with the practices of a certain industry). Further, under Appellants' rationale, the historic role of agencies in making permitting decisions and promulgating administrative rules[21] is diminished, if not eliminated, and supplanted by the individual judgment of trial court judges. This not only unwinds years of work and expense by the agencies and the regulated community, but it also removes any certainty that the permitting groundwork laid ahead of substantial capital investment by manufacturers and other businesses will be of any value whatsoever in any given county circuit court challenge to a project.

Appellants' exhortation to the Court to overrule *Preserve the Dunes* would, if successful, result in a judicial expansion of MEPA liability by allowing private citizens to use MEPA as a vehicle to collaterally attack the validity of environmental permits—long after the permits have issued— based on alleged errors in the permit process, without considering whether the defendant's conduct would pollute, impair, or destroy natural resources. This improper expansion of MEPA will certainly undermine the finality of hundreds, if not thousands, of environmental permits issued to Michigan-based manufacturers.

Prohibiting certain conduct by a permittee on the ground that the conduct has damaged, or will damage the environment (which is sanctioned by the plain language of MEPA) is entirely different from invalidating a permit based on the fear of impairment. The whole point of MEPA

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[21] Such a result would effectively permit citizens to hold the MDEQ's regulatory discretion hostage, and cases like Citizens for *Envt'l Inquiry v Dep't of Envt'l Quality*, 2010 Mich App LEXIS 295 (2010), *lv. denied*, 2010 Mich LEXIS 1767 (Sept. 9, 2010) (attached as Exhibit 1) would be permitted to go forward. In that case, an environmental group sued MDEQ under MEPA, alleging that the MDEQ's failure to adopt greenhouse gas emissions limitations harmed the environment. The Court of Appeals held that, under *Preserve* the Dunes, administrative action, including the failure to promulgate administrative rules, is not "conduct" to which a MEPA claim could apply. If *Preserve the Dunes* is overturned, such a case would have proceeded to trial, and the trial court could have adopted a "pollution control standard" for greenhouse gas emissions. In that regard, the trial court would effectively be permitted to legislate environmental policy, in violation of Const 1963, art VI, § 1

is to protect natural resources from conduct that is likely to pollute, impair, or destroy natural resources, not to otherwise serve as a basis for invalidating an issued permit. A test that would allow a party to prove a MEPA violation on any other basis is contrary to the purpose and unambiguous language of MEPA. After all, MEPA was intended, and drafted, to be a vehicle to allow private parties to stop conduct that would pollute, impair, or destroy natural resources. It was not intended to violate the Michigan Constitution. Accordingly, *Preserve the Dunes* was held correctly, and the Court of Appeals holding in this regard must be affirmed.

IV. EVEN IF THIS COURT HOLDS THAT PRESERVE THE DUNES WAS INCORRECTLY DECIDED, FIDELITY TO STARE DECISIS PROHIBITS THIS COURT FROM OVERTURNING PRECEDENT WITHOUT A COMPELLING JUSTIFICATION, PARTICULARLY WHERE THE ISSUES IN THIS CASE HAVE BEEN RESOLVED

A. PRESERVE THE DUNES MUST BE UPHELD UNDER STARE DECISIS

Even if this Court determines that *Preserve the Dunes* was decided incorrectly, a commitment to the principle of *stare decisis* requires this Court to adhere to its prior holdings, absent compelling justification. No such compelling justification exists with respect to *Preserve the Dunes.* Moreover, overturning significant cases where the issues in the present case are moot sets a particularly perilous precedent that dangerously expands the judicial power granted to the judicial branch by the Michigan Constitution.

Stare decisis refers to a court's general policy "to abide by, or adhere to, decided cases." *Robinson v Detroit*, 462 Mich 439, 463 n 20; 613 NW2d 307 (2000) (quoting Black's Law Dictionary (4th ed)). "Key to the doctrine is the concept that some precedent should be upheld notwithstanding its flaws." *People v Gardner*, 482 Mich 41, 83; 753 NW2d 78 (2008) (Kelly, J., dissenting). Moreover, "if each successive Court, believing its reading is correct and past readings wrong, rejects precedent, then the law will fluctuate from year to year, rendering our

jurisprudence dangerously unstable." *Pohutski v City of Allen Park*, 465 Mich 675, 712; 641 NW2d 219 (2002) (Kelly, J., dissenting).

In *Robinson*, this Court recognized that "*[s]tare decisis* is generally the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Robinson, supra* at 463 (citation and internal quotation marks omitted). To that end, "[w]hile *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in [a court's] past have occurred for articulable reasons, and only when the Court has felt obliged to bring its opinions into agreement with experience and with facts newly ascertained." *Vasquez v Hillery*, 474 US 254, 265-266; 106 S Ct 617; 88 L Ed 2d 598 (1986) (quotations and citation omitted).

As relevant to the instant case, the doctrine of *stare decisis* is particularly compelling in matters of statutory interpretation, "because if this Court previously interpreted a statute incorrectly, the Legislature can subsequently remedy that interpretation and fix the statute, which it has not done in this case." *Paige v City of Sterling Heights*, 476 Mich 495, 535-536; 720 NW2d 219 (2006) (Cavanagh, J., dissenting in part and concurring in part). "[A]dherence to *stare decisis* in matters of statutory interpretation where the Legislature has not corrected the interpretation respects principles of separation of powers, is consistent with the 'judicial role,' and avoids arbitrariness." *Id.*

The *Robinson* Court set forth four factors to be considered when deciding whether to overrule precedent, including: (1) whether the earlier case was wrongly decided, (2) whether the decision defies "practical workability," (3) whether reliance interests would work an undue

hardship, and (4) whether changes in the law or facts no longer justify the questioned decision.[22] *Robinson, supra* at 464-466. The proper application of the factors listed above to *Preserve the Dunes* weighs completely in favor of maintaining this Court's commitment to *stare decisis.*

First, and as discussed more fully above in Section III.B, *Preserve the Dunes* was correctly decided.

Second, given that *Preserve the Dunes* interprets MEPA, an unambiguous statute, it cannot be said to "def[y] practical workability," or to "lead[] to arbitrary outcomes and inject[] instability into the law." *Petersen, supra* at 575. Rather, *Preserve the Dunes* interpretation of MEPA to limit claims to restrain "conduct," as opposed to merely administrative decisions, prevents the instability inherent in allowing judicial interference with the executive branch's authority. The interpretation of MEPA to extend its reach only to actual conduct that directly impacts natural resources is an objective test that can be applied consistently, and only with regard to the unambiguous statutory language of MCL § 324.1701. This factor does not support a finding of a compelling justification to overturn *Preserve the Dunes.*

Third, litigants' and lower courts' reliance on *Preserve the Dunes* is "such that overruling it would cause a special hardship and inequity," *Petersen, supra* at 576. Defendants have reasonably and consistently relied on *Preserve the Dunes* for several years in managing permitting processes, relying on administrative rules promulgated by the MDEQ, investing in infrastructure and development, allocating risk and evaluating potential claims. Overruling *Preserve the Dunes* would result in not only the unwarranted usurpation of the legislative and executive functions, but would also inject a level of uncertainty into the process of moving or

[22] *Amicus* notes that Chief Justice Kelly proposed a new test for *stare decisis* in her majority opinion, also signed by Justice Cavanagh, in *Petersen v Magna Corp*, 484 Mich 300; 773 NW2d 564 (2009). Should the Court adopt Chief Justice Kelly's test, *amicus* respectfully submits that the additional factors set forth in *Petersen,* to the extent they are relevant, would also weigh in favor of upholding *Preserve the Dunes.*

expanding businesses in the State of Michigan. Businesses may have made decisions regarding investments, mergers, acquisitions and growth based on their reliance on the finality of a permit or administrative rule. In contrast, no plaintiff could reasonably have relied upon the position urged by the Plaintiff in this case, given that it is contradicted by statute. This factor therefore weighs in favor of respect for *Preserve the Dunes* as precedent.

Fourth, there are no changes in the law or facts such that *Preserve the Dunes* is no longer justified. The Legislature has not amended MEPA in response to *Preserve the Dunes* and subsequent holdings applying *Preserve the Dunes*. Therefore, this factor is not applicable to this Court's consideration of *Preserve the Dunes.*

Accordingly, each of the factors that would be considered in determining whether there is a basis to depart from *stare decisis* weigh in favor of upholding *Preserve the Dunes.* Because a commitment to *stare decisis* is so critical to a reliable and predictable jurisprudence, without such a compelling justification, a mere change in makeup of the Court should not used to overrule binding precedent that accurately interprets a statute upon which citizens have relied. Therefore, even if this Court determines that *Preserve the Dunes* was incorrectly decided, *stare decisis* requires that it continue to be the law in this state until a compelling justification exists to overturn it.

B. A MOOT CASE MUST NOT BE USED AS A VEHICLE FOR OVERTURNING PRECEDENT

A commitment to *stare decisis* is even more significant in this case, where the issues in dispute have been rendered moot. It is well established that "this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us unless the issue is one of public significance that is likely to recur, yet evade judicial review." *Federated Pubs, Inc v Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002).

A case is "moot" when the claims raised in the case are no longer at issue, or the parties to the case lose their legal interest in its outcome. The Michigan Supreme Court has described a moot issue as one which "presents 'nothing but abstract questions of law which do not rest upon existing facts or rights.'" *Sch Dist of East Grand Rapids v Kent County Tax Allocation Bd,* 415 Mich 481, 390; 330 NW2d 7 (1982) (quoting *Gildemeister v Lindsay*, 212 Mich 299, 302; 180 NW 633 (1920). It is "universally understood . . . that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, . . . or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." *People v Richmond*, 486 Mich 29, 35; 782 NW2d 187 (2010), *quoting Anway v Grand Rapids R Co*, 211 Mich 592, 610; 179 NW 350 (1920). "Our courts do not lack for genuine adversary litigation and we at least try not to do an idle thing." *LaBello v Victory Pattern Shop*, 351 Mich 598, 605; 88 NW2d 288 (1958).

Overturning precedent should be a rare event, and should certainly be restricted to cases where the overturning of the prior case is *necessary* to a decision that will actually resolve a true conflict between adverse parties. Otherwise, a court's authority will be overextended to allow for advisory opinions in a legal vacuum, and allow a majority to shape jurisprudence unmoored from any actual dispute.

In this case, Appellants' claims were based on a specific proposed activity – the discharge of wastewater by Merit Energy. Merit Energy no longer has the physical means of (or any intent to move forward with) discharging the treated water, which is the harm Appellants sought to enjoin. Therefore, the disputed issues in this case have been resolved. The Court is now left with only abstract questions of law, and the resolution of these abstract questions will not affect the parties in this case in any manner. Resolution of these abstract questions, rather,

will allow this Court to proactively change the course of Michigan jurisprudence in a manner that is inconsistent with judicial restraint and limits on the role of the judiciary. *Amicus* respectfully submits that using a moot case as a vehicle to overturn precedent would seriously undermine the important principles of *stare decisis* and a commitment to precedent except only in the rarest of cases.

C. A PREDICTABLE LEGAL CLIMATE IS ESSENTIAL TO THE STATE'S ECONOMY

Amicus also urges this Court to note that *stare decisis* is not simply a theoretical doctrine nor a laudable characteristic of judicial restraint. The stability it provides is the lynchpin to a predictable legal environment that is vital to developing, drawing and retaining both foreign and domestic business in Michigan. Its practical importance must not be diminished, particularly in Michigan's current harsh economic climate.

Since 2002, Harris Interactive, Inc., on behalf of the U.S. Chamber of Commerce, has conducted annual surveys of between 1,599 and 824 in-house general counsel or other senior litigators at public and private corporations with annual revenues of at least $100 million ("Respondents"). Among multiple findings regarding the legal and business climate in all fifty states, these surveys overwhelmingly demonstrate that the state-litigation climate affects important business decisions such as where to locate or do business.[23]

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[23] *See 2002 U.S. Chamber of Commerce State Liability Systems Ranking Study*, Harris Interactive, Inc. for the U.S. Chamber of Commerce, pp 6, 8 (January 11, 2002) (among 824 Respondents, 78% reported that the litigation environment in a state could affect important business decisions at their company); *2003 U.S. Chamber of Commerce State Liability Systems Ranking Study*, Harris Interactive, Inc. for the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform, p 1 (April 9, 2003) (among 928 Respondents, 82% reported that the litigation environment in a state could affect important business decisions at their company); *2004 U.S. Chamber of Commerce State Liability Systems Ranking Study*, Harris Interactive, Inc. for the U.S. Chamber of Commerce Institute for Legal Reform, pp 6, 8 (March 3, 2004) (among 1,402 Respondents, 80% reported that the litigation environment in a state could affect important business decisions at their company); *2005 U.S. Chamber of Commerce State Liability Systems Ranking Study*, Harris Interactive, Inc. for the U.S. Chamber of Commerce Institute for Legal Reform, pp 5, 8 (March 8, 2005) (among 1,437 Respondents, 81% reported that the litigation environment in a state could affect important business decisions at their company); *2006 U.S. Chamber of*

Among the other facets of these surveys is an annual national ranking of each state's overall treatment of tort and contract litigation, treatment of class action suits, punitive damages, timeliness of summary judgment/dismissal, discovery, scientific and technical evidence, and enforcement of meaningful venue requirements. In a statistical comparison of the 2002 results of the states' ranking on these factors to real gross state product ("GSP") per capita from 1995 to 1999, economists Todd G. Buchholz and Robert W. Hahn, Ph.D. found that the impact of a state's legal system on economic growth is statistically significant. Particularly, using an "ordinary least squares regression technique," Buchholz and Hahn found that for "every increase in rank (demonstrating an improvement in the state's legal framework) the state's average growth in per capita GSP increased by 0.15% (plus or minus .11%)." *See* Todd G. Buchholz and Robert W. Hahn, "Does a State's Legal Framework Affect Its Economy?" U.S. Chamber Institute for Legal Reform, p 4 (November 13, 2002).[24] Based on these findings, Buchholz and Hahn concluded that "[a] state that imposes a capricious or arduous court system on businesses is likely stunting growth compared with a state that offers a more reasonable structure." *Id.* at 2.

There is further empirical evidence that a capricious or unstable legal environment can reduce foreign investment in the U.S. The United States Department of Commerce reported that:

Commerce State Liability Systems Ranking Study, Harris Interactive, Inc. for the U.S. Chamber of Commerce Institute for Legal Reform, pp 6, 8 (March 17, 2006) (among 1,456 Respondents, 70% reported that the litigation environment in a state could affect important business decisions at their company); *2007 U.S. Chamber of Commerce State Liability Systems Ranking Study*, Harris Interactive, Inc. for the U.S. Chamber of Commerce Institute for Legal Reform, pp 6, 8 (April 16, 2007) (among 1,599 Respondents, 57% reported that the litigation environment in a state could affect important business decisions at their company); *2008 U.S. Chamber of Commerce State Liability Systems Ranking Study*, Harris Interactive, Inc. for the U.S. Chamber of Commerce Institute for Legal Reform, pp 6, 8 (April 15, 2008) (among 957 Respondents, 63% reported that the litigation environment in a state could affect important business decisions at their company); and *2010 U.S. Chamber of Commerce State Liability Systems Ranking Study*, Harris Interactive, Inc. for the U.S. Chamber of Commerce Institute for Legal Reform, p. 7 (March 9, 2010) (among 1,482 Respondents, 67% reported that the litigation environment in a state is likely to impact important business decisions). All reports available online at http://www.instituteforlegalreform.com/component/ilr_docs/29/issue/LAI/STU.html (accessed September 20, 2010).

[24] Report available online at http://www.instituteforlegalreform.com/component/ilr_docs/29/issue/LAI/STU.html?start=40 (accessed September 28, 2010).

> In 2007, at $2.4 trillion, total U.S. FDI [foreign direct investment] was equivalent to 17 percent of U.S. GDP. Foreign firms employ more than 5.3 million U.S. workers through their U.S. affiliates and have indirectly created millions of additional jobs. More than 30 percent of the jobs directly created through FDI are in manufacturing, and these jobs account for 12 percent of all manufacturing jobs in the United States.

Charles G. Schott, The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty, U.S. Department of Commerce, International Trade Administration (October 29, 2008)[25] (citing Thomas Anderson, "U.S. Affiliates of Foreign Companies: Operations in 2006," Survey of Current Business 88, no. 8, pp.186–203(August 2008)).[26]

In Michigan, the United States Department of Commerce Bureau of Economic Analysis reported that in 2006, foreign-controlled companies employed 194,400 Michigan workers. Nearly two-fifths of these jobs (40 percent, or 77,100 workers) were in the manufacturing sector, meaning that nearly one of every eleven manufacturing workers in Michigan (8.9 percent) were employed by foreign-controlled companies in 2006. In the aggregate, foreign investment in Michigan was responsible for 4.1 percent of the state's total private-industry employment in 2006. United States Department of Commerce, Bureau of Economic Analysis, *Foreign Direct Investment in the U.S.: Financial and Operating Data for U.S. Affiliates of Foreign Multinational Companies 2002-2006.*[27]

This is significant because in a recent survey reported by the United States Department of Commerce, the chief concerns expressed by foreign investors with U.S. markets were: "(a) the comparatively high legal cost of doing business in the U.S. market and (b) the unpredictable and

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[25] Report available online at http://www.investamerica.gov/iia_main_019689.asp (accessed September 28, 2010).
[26] Report available at www.bea.gov/scb/pdf/2008/08%20August/0808_affiliate.pdf (accessed September 28, 2010).
[27] Report available at http://www.bea.gov/international/di1fdiop.htm (accessed September 22, 2010). Note: All figures exclude employment in banks affiliated with foreign companies.

unfamiliar nature of liability in the United States. Each is directly related to the litigious nature of the U.S. legal system." *Schott, supra* at 5.

As demonstrated by the data discussed above, legal stability is a major concern for both domestic and foreign business investors in Michigan, and an unpredictable liability environment directly affects whether business will come to or stay in Michigan. Moreover, if a manufacturer cannot accurately predict and account for its potential liabilities as a result of the inconsistent application of statutes, for example, the transaction costs associated with the production of goods will necessarily rise, businesses will suffer, and jobs will be lost. Therefore, both businesses and Michigan residents benefit from manufacturers' ability to rely on a consistently applied set of laws.

V. THIS COURT SHOULD ADOPT A NEW "STANDING" TEST FOR MEPA CLAIMS, GIVEN THE IMPRACTICABILITY OF APPLYING LANSING SCHOOLS TO MEPA CASES.

Finally, this Court asked the parties to brief the issue of whether *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007) (*"Nestlé"*) was decided correctly. Although this Court overturned *Nestlé* in its recent opinion in *Lansing Schools,* 2010 Mich. LEXIS 1657, *amicus* reframes this question slightly to consider the serious impact that *Lansing Schools* will have on manufacturers, the courts and Michigan jurisprudence.

In *Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004), this Court held that a plaintiff must demonstrate constitutional standing (injury in fact, causation and redressability) even where the Legislature has purported to grant standing by statute, such as in the Michigan Environmental Protection Act, MCL § 324.1701. In *Nestlé*, this Court reaffirmed its holding in *Cleveland Cliffs a*nd clarified that the Legislature may not expand

judicial power through a statutory grant of standing without an unconstitutional blurring of the separation of powers and expansion of the judicial power.

Michigan jurisprudence has always required that a plaintiff demonstrate an injury or other substantial interest in the subject matter of a lawsuit for standing to exist. In *House Speaker v State Administrative Bd*, 441 Mich 547, 554; 495 NW2d 539 (1993), this Court held:

> Standing is a legal term used to denote the existence of a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy. However, evidence that a party will engage in full and vigorous advocacy, by itself, is insufficient to establish standing. Standing requires **a demonstration that the plaintiff's substantial interest will be detrimentally affected in a manner different from the citizenry at large.**

In addition to those prudential standing requirements, until very recently, under Michigan law, a plaintiff also had to demonstrate (1) injury in fact; (2) causation; and (3) redressability. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001). These constitutional standing requirements ensured that the judicial branch did not hear cases where no concrete dispute existed, thus restraining the judicial power to its authority provided by the Michigan Constitution.[28] Despite the fact that Michigan law had historically recognized a constitutional requirement for standing,[29] and in a sharp departure from precedent, on July 31,

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[28] The separation of powers mandated in Const 1963, art III, § 2 is furthered by the division of the powers of government among the executive (Const 1963, art IV), legislative (Const 1963, art V) and judicial (Const 1963, art VI) branches.

[29] The Michigan Supreme Court has long acknowledged these boundaries on the power of the judiciary, consistently restricting the judicial power to only hearing cases where an actual dispute exists. *Anway v Grand Rapids R Co*, 211 Mich 592; *see also, e.g., Daniels v People*, 6 Mich 381, 388 (1859) ("judicial power" is "the power to hear and determine controversies between adverse parties, and questions in litigation"); *Goetz v Black,* 256 Mich 564; 240 NW 94 (1931) (Judicial power is the power of the court to decide and pronounce its judgment and to carry it into effect between persons and parties who bring a case before it for decision); and *Judges for Third Judicial Circuit v County of Wayne,* 383 Mich 10, 172 NW2d 436, (1969); *r'hg* 386 Mich 1; 190 NW2d 228(1971), *cert den* 405 US 923 (1972) (defining judicial power as the power to decide cases between contending parties and to determine legal rights in other cases where permitted by law); *Rozankovich v Kalamazoo Spring Corp*, 44 Mich App 426; 205 NW2d 311 (1973) (Appellate courts ordinarily will not render advisory opinions or decide cases or questions involving no real controversy).

2009, this Court modified this most basic and fundamental tenet of standing, holding instead that:

> a litigant has standing whenever there is a legal cause of action. .... Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Lansing Sch Educ Ass'n, supra at *34-35. Therefore, if "a cause of action is provided by law," a plaintiff need not show a "substantial interest[] that will be detrimentally affected in a manner different from the citizenry at large," a requirement that has always been a part of standing jurisprudence, even prior to *Lee, supra. See Detroit Fire Fighters Ass'n v Detroit,* 449 Mich 629; 537 NW2d 436 (1995).[30]

Because of its recent vintage, the challenges inherent in applying this test to cases involving MEPA have not yet surfaced. However, it is not difficult to imagine the maelstrom that will ensue once the first MEPA climate change cases are brought under this new regime.

As discussed above, MEPA provides a cause of action for "any person" to bring suit to challenge "conduct" that has or will impair natural resources. MCL § 324.1701. Under the *Lansing Schools* test, a plaintiff could assert that this statute provides a "cause of action" that automatically grants standing to "any person," and "implies that the Legislature intended to confer standing on the litigant" even if the plaintiff has no substantial interest affected in a manner different than the citizenry at large. A plaintiff who has not been harmed, but is merely

[30] Arguably, in adopting this test, this Court went even further than merely overturning *Lee*, which was intended to **supplement** the jurisprudential standing requirements. *Lee, supra* at 738-39, quoting *House Speaker,* 441 Mich at 554. In allowing a plaintiff to maintain a cause of action even where he cannot demonstrate a "substantial interest" impacted in a "manner different than the citizenry at large," this Court also may have implicitly overturned *House Speaker.*

opposed to the permitting of a power plant, or frustrated at the MDEQ's failure to prohibit emissions of greenhouse gases, will now be able to wreak havoc on administrative proceedings and established projects in which millions of dollars have been invested. Applying the law to a situation in which there is no injury, but merely a philosophical objection, will foster overbroad judicial decisions and the fashioning of disproportionate or inappropriate relief that does not quite fit with the traditional judicial role of applying the law to a controversy between adverse parties. Moreover, attempts to fashion a remedy under MEPA for a plaintiff who represents nothing more than a political interest group, where there is no injury in fact or demonstration of causation, would permit courts to teeter dangerously into the province of the legislative and the executive branches.

Consider one example: Plaintiffs are increasingly resorting to the courts to remedy the effects of climate change caused by emissions of greenhouse gases.[31] A typical climate change litigation fact pattern may include a plaintiff who claims to be injured by the environmental effects of climate change, whether it be catastrophic weather events, rising sea levels, drought or impacts to wildlife.[32] In many of these cases, the plaintiff cannot point to a specific injury in fact experienced by that plaintiff alone. Nevertheless, where a citizen suit law provides statutory standing for any person to bring suit to enjoin pollution, where no constitutional standing is required, such a plaintiff would have standing to bring claims for damages or to enjoin activities allegedly causing climate change.

MEPA purports to provide statutory standing to "any person" to bring suit for "declaratory and equitable relief against any person for the protection of the air, water, and other

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[31]Meltz, Robert, "Climate Change Litigation: A Survey," Congressional Research Service RL32764 (April 15, 2009), p 1, available online at http://opencrs.com/document/RL32764/ (accessed September 21, 2010).

[32] For examples of climate change litigation, *see Native Village of Kivalina v Exxon Mobil Corp,* 663 F Supp. 2d 863 (ND Cal 2009)*; Comer v Murphy Oil USA,* 585 F3d 855 (5th Cir 2009*) vac'd by, r'hg granted by, en banc,* 2010 U.S App LEXIS 4253 (5th Cir Feb 26, 2010), appeal dismissed by 607 F3d 1049 (5th Cir May 28, 2010).

natural resources and the public trust in these resources from pollution, impairment, or destruction" MCL § 324.1701. Under *Lansing Schools*, the plaintiff in a MEPA suit need not demonstrate any injury or harm suffered by the plaintiff in a manner different than the citizenry at large. Rather, the plaintiff need only identify and allege harm to a natural resource. Any plaintiff could sue literally any greenhouse gas emitter, from school districts with bus fleets to coal-fired power plants, to individuals who own or drive automobiles. The sprawling litigation that would ensue poses significant legal and practical problems for the court, including the nearly impossible task of tracing the tenuous line from one pound of greenhouse gas emitted to the harm alleged by plaintiff, and the difficulties of accurately allocating fault among named defendants and non-parties at fault, a group which presumably could include every person in the state of Michigan.

Even if a court could get past these practical struggles, identifying and implementing a remedy in a climate change lawsuit brought under MEPA implicates critical constitutional issues. In fashioning a remedy for the alleged pollution, impairment or destruction, MEPA empowers a court to determine the "validity, applicability and reasonableness" of any applicable pollution standard, rule or regulation. *Id.* If the court determines that the standard, rule or regulation is "deficient," the court may "direct the adoption of a standard approved and specified by the court." *Id.* Thus, without any benchmark for standing, the court would be freely empowered to review and deem insufficient legislation intended to regulate greenhouse gas emissions or regulations promulgated by an agency of the executive branch setting emissions standards just by virtue of a citizen's frustration with the political process. For example, if a court identifies applicable statutory emissions limitations and finds that the limitations are ineffective to curb the complained-of climate change and the resulting harms, the court would

have the power to literally rewrite or adopt new emissions limitations, an action that is undeniably within the province of the legislature.[33] Moreover, without the benefit of agency input, experts, public comment and legislative hearings and debates that provide the foundation for laws and regulations, the courts are ill-equipped to develop and implement scientifically based greenhouse gas emissions standards. Not only does this scenario not make practical sense, but permitting the courts to draft environmental standards directly results in an unconstitutional usurpation of the power of the legislative and executive branches, and would permit the least politically accountable branch to play a significant role in the development of environmental policy, a function not within the judicial power. Courts would not be applying the law, as is the traditional role of the judiciary, but would be writing the law, which is the function of the legislature.

In considering a hypothetical climate change claim under MEPA, the importance of sensible standing jurisprudence for MEPA suits becomes clear. This Court should modify the *Lansing Schools* test to require, at the very least, a showing of "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large" even if "the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Amicus* proposes that the *Lansing Schools* test be reconsidered, and that the Court adopt a new standing test as follows:

> Whether or not a cause of action is expressly provided at law, a court must initially determine that a litigant has standing. A litigant may have standing if there is a cause of action provided at law **and** the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large.

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[33] See Shi-Ling, *A Realistic Evaluation Of Climate Change Litigation Through The Lens Of A Hypothetical Lawsuit,* 79 U Colo L Rev 701, 717 (2008) (noting that civil climate change legislation, if successful, "skips over the potentially cumbersome, time-consuming, and politically perilous route of pursuing legislation and regulation.")

This test will ensure that the jurisprudential requirements of standing will remain in their proper place in Michigan law to promote judicial restraint and protect against the blurring of lines among the three branches of government. This, at the very least, is required by the Michigan Constitution, the doctrine of the separation of powers, and a sensible view of Michigan jurisprudence.

CONCLUSION AND RELIEF REQUESTED

Thomas Jefferson said "Agriculture, manufacturers, commerce, and navigation, the four pillars of our prosperity, are the most thriving when left most free to individual enterprise." While the protection of the natural resources is of paramount concern to all citizens of this world, the rule of law is also important. Consistency in our laws, and a stable legal environment, allows the "pillars of our prosperity" to assist society in thriving, evolving and developing new and creative ways to live and work in harmony with our natural resources. The decision of the Court of Appeals in this case not only demonstrates fidelity to precedent, but appropriately balances the competing desires of our society so that prosperity – both in regard to tangible things as well as natural resources – can be assured for the next generation.

Accordingly, *amicus* respectfully requests that this Court affirm the Court of Appeals, and/or hold that (1) riparian rights, including the right to discharge water, may be conveyed by easement, subject to the reasonable use balancing test; (2) the reasonable use balancing test remains good law in Michigan; (3) claims under MEPA may only be brought to enjoin conduct that has or may impair natural resources; and (4) in order to bring a MEPA claim, a plaintiff must at least demonstrate a substantial interest impacted in a manner different than the citizenry at large.

Respectfully submitted,

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Date: September 28, 2010

LEXSEE 2010 MICH APP LEXIS 295

CITIZENS FOR ENVIRONMENTAL INQUIRY, BYRON DELONG, THOMAS HARKLEROAD, WILLIAM LEWIS, JOHN PLATH, JEAN VESELENAK, and CHARLES WINTERS, Plaintiffs-Appellants, v DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant-Appellee, and MID MICHIGAN ENERGY, LLC, WOLVERINE POWER SUPPLY COOPERATIVE, INC., and CONSUMERS ENERGY COMPANY, Intervening Defendants-Appellees.

No. 286773

COURT OF APPEALS OF MICHIGAN

2010 Mich. App. LEXIS 295; 40 ELR 20049

February 9, 2010, Decided

SUBSEQUENT HISTORY: Leave to appeal denied by Citizens for Envtl. Inquiry v. Dep't of Envtl. Quality, 2010 Mich. LEXIS 1767 (Mich., Sept. 9, 2010)

PRIOR HISTORY: [*1]
Ingham Circuit Court. LC No. 08-000114-AW.

CORE TERMS: emissions, air, natural resources, legal right, legal duty, promulgate, reconsideration, Act MEPA, mandamus relief, writ of mandamus, special injury, public trust, wrongful conduct, promulgation, rulemaking, pollution, mandamus, complied, promulgate a rule, administrative decision, air quality, written statement, specific right, unregulated, regulating, possessed, destroyed, polluted, impaired, issuing

JUDGES: Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

OPINION

PER CURIAM.

Plaintiffs appeal as of right the circuit court's grant of summary disposition in favor of defendants. We affirm.

On August 27, 2007, as authorized by MCL 24.238 of the Administrative Procedures Act (APA), counsel for plaintiffs sent a letter to the director of defendant Department of Environmental Quality (DEQ) requesting that the DEQ promulgate a rule regulating emissions of CO[2]. After the 90-day period set forth in the statute had elapsed, plaintiffs filed this case.

Plaintiffs' amended complaint contained three counts. The first count sought mandamus relief requiring the DEQ to promulgate rules regulating CO[2] emissions as set forth under MCL 324.5512 of the Natural Resources and Environmental Protection Act (NREPA), which mandates that the DEQ "promulgate rules for purposes of . . . [c]ontrolling or prohibiting air pollution." *Id.* The second count sought mandamus relief requiring the DEQ to comply with MCL 24.238 of the APA, either by initiating the rulemaking requested, or by issuing "a concise written statement of its principal reasons for denial of the request." The [*2] third count sought to enjoin the DEQ from issuing any air quality permits until they had complied with either MCL 324.5512 of the NREPA or MCL 24.238 of the APA.

Shortly after the lawsuit was filed, the DEQ sent a letter to plaintiffs' counsel denying the rulemaking request, and explaining why. The DEQ then moved for summary disposition under MCR 2.116(C)(4). The DEQ argued that they had complied with MCL 24.238, rendering the second and third counts of the complaint moot. Further, the DEQ argued that the first count should be dismissed because it was effectively an effort by plain-

tiffs to seek judicial review of the DEQ's denial of the rulemaking request, which is explicitly disallowed under MCL 24.238.

Subsequently, the motion for summary disposition was granted. With regard to the first count of plaintiffs' complaint, the trial court held that plaintiffs failed to state a valid claim for mandamus because (1) plaintiffs did not demonstrate a clear legal right to the promulgation of specific rules regarding CO[2] emissions, (2) MCL 324.5512 does not impose upon the DEQ a "clear legal duty" to regulate CO[2] emissions, (3) MCL 324.5503(a) grants the DEQ discretion as to whether to promulgate [*3] rules controlling and prohibiting various emissions, and (4) plaintiffs were given what they were entitled to under the APA.

With regard to the second and third counts of plaintiffs' complaint, the court noted that MCL 24.238 unambiguously provides that the agency's denial of a request to promulgate a rule "is not subject to judicial review." Because the DEQ denied the request with a concise written statement of the principle reasons, the counts that sought compliance with MCL 24.238 were moot and the court lacked jurisdiction to review the DEQ's denial. Thus, the DEQ's motion for summary dismissal was granted and plaintiffs' complaint was dismissed. Plaintiffs moved for reconsideration, and sought leave to amend the complaint a second time, seeking declaratory and injunctive relief under MCL 324.1701 of the Michigan Environmental Protection Act (MEPA). The motion was denied and this appeal followed.

Plaintiffs argue that the trial court's summary dismissal of their complaint was erroneous because they were entitled to a writ of mandamus. We disagree. A trial court's decision on a motion for summary disposition is reviewed de novo. *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009). [*4] Whether a defendant has a clear legal duty to perform, and whether a plaintiff has a clear legal right to that performance present legal questions subject to de novo review. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006).

To establish a right to mandamus relief, the plaintiffs must prove that (1) they have a clear legal right to the performance of the specific duty sought to be compelled, (2) the defendant has a clear legal duty to perform it, (3) the act is ministerial in nature, and (4) the plaintiffs have no other adequate legal or equitable remedy. *Inglis v Public School Employees Retirement Bd*, 374 Mich 10, 13; 131 NW2d 54 (1964); *White-Bey v Dep't of Corrections*, 239 Mich App 221, 223-224; 608 NW2d 833 (1999). As a general rule, mandamus only lies when the plaintiffs have "a specific right . . . not possessed by citizens generally." *Wilson v Cleveland*, 157 Mich 510, 511; 122 NW 284 (1909). Thus, the plaintiffs generally have to demonstrate some special injury beyond what would be suffered by the public at large. *Inglis, supra* at 12.

Here, as the trial court held, plaintiffs did not establish that they have a clear legal right to the promulgation of [*5] specific rules regarding CO[2] emissions. The only injury alleged in plaintiffs' amended complaint arising from unregulated CO[2] emissions is "[g]lobal warming and/or climate change," which, in plaintiffs' own words, "imposes upon all the people of Michigan a severity of injury that is indivisible and at once a substantial concrete injury personal to every citizen." Thus plaintiffs have not alleged a special injury distinct from the injury suffered by the general public; in fact, they have alleged the opposite. And in their brief on appeal plaintiffs have not set forth any such special injury. "[I]t has long been the policy of the courts to deny the writ of mandamus to compel the performance of public duties by public officials unless the specific right involved is not possessed by citizens generally." *Univ Medical Affiliates, PC v Wayne Co Executive*, 142 Mich App 135, 143; 369 NW2d 277 (1985), citing *Inglis, supra*. Accordingly, we affirm the trial court's summary dismissal of plaintiffs' request for a writ of mandamus.

In light of our conclusion that plaintiffs failed to establish that they had a clear legal right to the promulgation of specific rules regarding CO[2] emissions, we [*6] need not consider (1) whether the DEQ had a clear legal duty to promulgate specific rules regarding CO[2] emissions, and (2) whether MCL 24.238 prohibited plaintiffs' claim for mandamus.

Next, plaintiffs challenge the trial court's denial of their motion for reconsideration. A motion for reconsideration should be granted only when the court has made "a palpable error by which the court and parties have been misled," and when correction of that error would have led to a different disposition of the motion. MCR 2.119(F)(3). Plaintiffs argue that the trial court's error was in overlooking plaintiffs' claim under MCL 324.1701 of the MEPA as set forth in their proposed second amended complaint. We disagree. Because plaintiffs did not state a claim under MEPA, the trial court did not abuse its discretion in denying plaintiffs' motion. See *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

In their proposed second amended complaint, plaintiffs alleged that the DEQ air permit regulatory regime was deficient under the MEPA because it "includes no standard for the protection of natural resources against likely pollution, impairment, or destruction resulting from unregulated CO[2] [*7] emissions." Plaintiffs further alleged that the DEQ's "consideration of air permit applications under a regime that does not consider CO[2]

emissions at all is contrary to the Department's mandatory obligation under MEPA to determine the likely pollution, impairment, and destruction of air, water, and other natural resources, or the public trust in those resources." Thus, plaintiffs sought to enjoin the issuance of air quality permits until the DEQ complied with its legal duties set forth in the MEPA.

In *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004), our Supreme Court, held:

> To prevail on a MEPA claim, the plaintiff must make a "prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources . . . ." [*Id.* at 514, quoting MCL 324.1703(1).]

In that case, the plaintiff sued the DEQ alleging that the DEQ violated the MEPA when it approved a sand dune mining permit for a sand mining operation. *Preserve the Dunes, Inc*, *supra* at 511-512. Our Supreme Court rejected that claim, holding that the "MEPA [*8] provides no private cause of action in circuit court for plaintiffs to challenge the DEQ's determination of permit eligibility. . . . An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." *Id.* at 519. In other words, the MEPA authorizes suits against regulated or regulable actors who are specifically engaged in "wrongful conduct" that harms the environment.

Here, plaintiffs' proposed second amended complaint failed to allege that "conduct of the [DEQ] has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources." See *Preserve the Dunes, Inc, supra* at 514. Instead plaintiffs have challenged the DEQ's decision not to promulgate specific rules regarding the regulation of CO[2] emissions. This administrative decision does not constitute "wrongful conduct" within the contemplation of the MEPA. See *id.* at 519; see, also *Anglers of Ausable, Inc v Dep't of Environmental Quality*, 283 Mich App 115, 128-129; 770 NW2d 359 (2009). Because plaintiffs' proposed second amended complaint did not state a claim under the MEPA, the trial [*9] court did not abuse its discretion in denying plaintiffs' motion for reconsideration. See *In re Beglinger Trust, supra*.

Affirmed.

/s/ Mark J. Cavanagh

/s/ E. Thomas Fitzgerald

/s/ Douglas B. Shapiro